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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 441

SANDOR SCHWARTZ,

Petitioner,

against

CYRUS S. EATON, WALTER J. TUOHY, CYRUS S. EATON, JR., CLINTON W. MURCHISON, ANITA O'KEEFFE YOUNG, as Executrix of the Estate of ROBERT R. YOUNG, Deceased,

Defendants-Appellees below,

and

ROBERT BOWMAN, ROBERT J. BULKLEY, HERBERT FITZPATRICK, ALLAN B. KIRBY, WILLIAM H. LIPSCOMB, HARRY C. THOMPSON, THOMAS J. DEEGAN, JR., DARNUM L. COLTON, ROGER H. FERGER, MARTIN S. F. FOTHERINGHAM, FAY A. LEFEVRE, SIDNEY W. RICHARDSON, ALLEGHANY CORPORATION and THE CHESAPEAKE & OHIO RAILWAY CO.,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY L. GARWIN and J. MILTON FAINER,
Counsel for Petitioners,
1501 Broadway,
New York, New York 10036.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Sandor Schwartz, petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the

United States Court of Appeals for the Second Circuit, entered on May 19, 1966. The judgment of the Court of Appeals affirmed a judgment of the United States District Court for the Southern District of New York which dismissed the complaint as to certain defendants without a hearing on the merits.

The District Court dismissed the action nine years after its commencement on January 18, 1957, on the sole ground that the plaintiff had incorrectly brought the action as a traditional one judge district court action, when he should have brought it before a three judge court under the Urgent Deficiencies Act (28 U.S.C. Sec. 2321).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on May 19, 1966. A copy thereof is annexed to this petition in the Appendix at pages A28-A29.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

Opinions Below

The Court of Appeals rendered a short *per curiam* opinion in which it affirmed the determination of the District Court on the basis of the opinion rendered in that court. The *per curiam* Court of Appeals memorandum is set forth in the Appendix hereto at pages A31 to A32. It is reported at 360 F. 2d 211.

The opinion of the District Court is reported at 244 F. Supp. 51.

Questions Presented

1. Is the determination below squarely in conflict with *U. S.* v. *Griffin*, 303 U. S. 226 (1938), and *U. S.* v. *Jones*, 336 U. S. 641 (1949)?

2. Should this court grant certiorari in order definitely to fix the forum in which the plaintiff can have his day in court?

3. Is the determination below squarely in conflict with *Shannahan* v. *U. S.*, 303 U. S. 596 (1938), and *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 126. (1939)?

4. Is the determination below squarely in conflict with *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957), and the three judge court case of *Breswick & Co.* v. *U. S.*, 138 F. Supp. 123 (So. Dist. N. Y. 1955)?

5. Is the determination below squarely in conflict with the decision of the Court of Appeals for the Second Circuit in *Long Island Railroad Co.* v. *New York Central Co.*, 281 F. 2d 379 (2nd Cir., 1960)?

6. Should this court grant certiorari to correct an interpretation of the Urgent Deficiencies Act, which is of importance to the administration of the Interstate Commerce Act and which, if left alone, will open this court to a flood of appeals as of right, in situations where this right to appeal was never intended to be given either by Congress or this Court?

Statutes Involved

The statute involved is the Urgent Deficiencies Act (28 U.S.C. Sec. 2321), which is set forth in the Appendix on page A34.

Statement

The action is a stockholder's derivative action brought by a stockholder of The Chesapeake & Ohio Railway Co. (hereinafter "C&O"). The complaint attacks a transaction pursuant to which C&O sold to Alleghany Corpora-

tion, 800,000 shares of stock of New York Central Railroad Company, on or about February 23, 1954. Plaintiff, on behalf of C&O, seeks to have the sale rescinded as being void under Sec. 47 of the Investment Company Act (15 U.S.C. Sec. 80a-46), on the ground that Alleghany was an investment company which had failed to register with the Securities and Exchange Commission as required by the Investment Company Act.

The complaint alleges the following: at the times in question, Alleghany was an investment corporation which was subject to the Investment Company Act of 1940; under said Act, all investment corporations were required to register as such with the SEC; under the Act, if a corporation failed to register as required by the Act, all transactions entered into by it were null and void, and subject to rescission; the defendants participated in a conspiracy and plan for certain of the defendants to obtain control of New York Central Railroad Co. and to benefit themselves thereby; the control of Central was closely tied up to the ownership of a block of 800,000 shares which was owned by C&O; pursuant to the conspiracy and plan, C&O was caused to sell to Alleghany the 800,000 shares of Central stock; the purchase was in fact made by Alleghany even though it was made to appear as if the shares had been purchased by certain individuals who were used merely as nominees; the sale was made and caused to be made by the defendants with full and complete knowledge that the sale was void as a violation of the Investment Company Act; the sale of the 800,000 shares was null and void because Alleghany had failed to register with the SEC as required by the Investment Company Act.

Plaintiff, as a stockholder of C&O, seeks judgment rescinding the sale as null and void in violation of the Investment Company Act.

The answers admit that the transactions took place, but deny the other material allegations of the complaint.

The action was instituted on January 18, 1957, as a traditional one judge district court action. After nine years of litigation, including an unsuccessful attempt by the defendants to obtain summary judgment and to dismiss the complaint for failure to state a claim on which relief could be granted (156 F. Supp. 361), and an appeal therefrom (264 F. 2d 195), the defendants moved to dismiss the action on the ground that it was incorrectly commenced as a traditional one judge district court action, when it should have been brought before a three judge district court under the Urgent Deficiencies Act.

The District Court determined that the action should have been brought before a three judge district court under the Urgent Deficiencies Act, and dismissed the action because that had not been done. The determination was predicated primarily upon an order of the Interstate Commerce Commission ("ICC") dated June 5, 1945. That order, made nine years prior to the transactions involved in the case at bar, and set forth in the Appendix to this Petition at pages A33-A34, determined that Alleghany should be considered as a carrier subject to the provisions of the Interstate Commerce Act, because the ICC had approved Alleghany's acquisition of a controlling stock interest in C&O.

Section 3 of the Investment Company (15 USC Sec. 80a-3), provides that a corporation subject to regulation under the Interstate Commerce Act, is not subject to regulation under the Investment Company Act. According to the opinion of the District Court, which has been adopted by the Court of Appeals, on the date of the transactions which are the subject matter of the case at bar, the 1945 ICC order was still outstanding and no proceeding had been brought before the ICC to revoke it. Since success in the case at bar depends upon showing that Alleghany was subject to regulation under the Investment Company Act, the Court of Appeals held that the action at bar constituted an indirect attack upon the June 5, 1945 ICC order, and for this reason,

had to be brought against the United States as an indispensable party under the Urgent Deficiencies Act.

The pertinent facts, contained in documentary evidence and findings made by the District Court for the Southern District of New York in the cases of *Breswick* v. *Briggs*, 135 F. Supp. 397, and *Breswick* v. *United States*, 134 F. Supp. 132, are as follows:

Prior to June 5, 1945, Alleghany was an investment corporation subject to registration under the Investment Company Act, which had registered with the SEC as required by that Act. On June 5, 1945, Alleghany obtained the permission of the ICC to acquire stock ownership control of C&O, Nickel Plate and Pere Marquette and subsidiaries, all of which were railroad corporations. The permission of Alleghany to acquire control of these carriers was reflected in the order of the ICC dated June 5, 1945, which, in addition to granting Alleghany permission to acquire control over the carriers, determined that this acquisition of control caused Alleghany to become subject to the provisions of Section 5(2) of the Interstate Commerce Act, as a corporation which had to be considered a carrier.

The June 5, 1945 ICC order, after reciting its consent to Alleghany's acquiring control of C&O, provided as follows (A34):

> "That unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act to the same extent that those provisions are applicable to The Chesapeake and Ohio Railway Company and its carrier subsidiaries and affiliates; . . ."

Based upon this acquisition of C&O control, the SEC, on October 4, 1945, made an order recognizing the status of

Alleghany as a carrier subject to supervision by the ICC and exempted from supervision by the SEC. The order provided that if in the future Alleghany ceased to be subject to regulation under the Interstate Commerce Act, the exemption would terminate.

Alleghany's control of C&O continued for almost 9 years until January 19, 1954. On said date, Alleghany sold to defendant Eaton, all of the 104,854 shares of stock of C&O which it then owned. This stock represented Alleghany's controlling interest in C&O, and the sale resulted in Alleghany's divesting itself of its control of C&O.

By divesting itself of its control over C&O, the fact situation which had given Alleghany the basis for coming within ICC jurisdiction, no longer existed, and no fact situation existed for bringing Alleghany within the purview of the Interstate Commerce Act. It was not until September 17, 1954, when Alleghany and New York Central acquired control of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and subsidiaries, that a fact situation again existed for bringing Alleghany within the purview of the Interstate Commerce Act. Hence, during the eight month period from January 19, 1954, to September 17, 1954, no fact situation existed for bringing Alleghany within the jurisdiction of the Interstate Commerce Act.

It was during this eight month period, that the transactions which are the subject matter of the case at bar, took place.

On or about February 23, 1954, C&O sold to Alleghany, 800,000 shares of New York Central stock. The sale was accomplished through a series of complicated transactions and agreements using Alleghany monies, and defendants Murchison and Richardson as conduits. On May 26, 1954, Alleghany was the owner of the Central shares.

Alleghany's purpose in purchasing the shares, and C&O's purpose in selling them, was to help certain of the dominant officers and directors of Alleghany, particularly Young and Kirby, in a proxy fight for control of New York Central. Young and Kirby had sought to become directors of Central, but had been turned down. Because of this turndown, they decided to engage in a proxy fight with a view toward unseating Central's incumbent management at the annual stockholders' meeting of May 26, 1954.

Prior to the sale by C&O of the 800,000 Central shares, they were held in a voting trust pursuant to order of the ICC. The voting trustee under the trust agreement, was the Chase National Bank. Because the Chase Bank's representatives on the New York Central Board had voted against Young and Kirby becoming members of the Board of Directors, the Young-Kirby proxy fight could be successful only if Alleghany got the vote of these controlling shares. The only way that Alleghany could get the vote of these shares was to purchase the shares and get them out of the voting trust. This was accomplished by the transactions complained of in the case at bar. At the New York Central stockholders' meeting of May 26, 1954, Alleghany ousted the then current management and obtained control of the New York Central railroad system. At the same time, Young and Kirby became directors of New York Central.

There were certain aspects of the transactions which the parties wanted to keep secret. This was particularly true of Alleghany and its dominant officers and directors. Supervision of the transactions by either the ICC or the SEC, would have hampered the Alleghany officers and directors in the achievement of their ends. Hence, they needed to find an excuse for not subjecting themselves to any kind of governmental supervision—either by the ICC or the SEC. They decided to use the June 5, 1945 ICC order as a shield.

If they could argue that they were no longer subject to ICC jurisdiction after January 19, 1954 when they disposed of C&O control, this would justify a contention that the ICC did not have jurisdiction over the transactions in question. If they could argue that the physical existence of the June 5, 1945 order exempted Alleghany from compliance with the provisions of the Investment Company Act, this would justify a contention that the SEC did not have jurisdiction over the transactions in question. Alleghany, therefore, embarked upon a course of conduct calculated to enable it to make both of these contentions, by double dealing with both the ICC and the SEC. In order to help it carry out these purposes, Alleghany wilfully and deliberately refrained from bringing a proceeding before the ICC to revoke the order of June 5, 1945.

The ICC order of June 5, 1945 had authorized Alleghany to acquire control of C&O subject to three express conditions (A33). These conditions related to the depositing of stocks with independent voting trustees, and to the elimination of interlocking directors (A33). After Alleghany disposed of its C&O control, it refused to comply with these conditions. It took the position: that the ICC had authority to subject Alleghany to its authority only because Alleghany had acquired control of C&O; that the order of June 5, 1945 was predicated upon this acquistion of C&O control; that continued effectiveness of the order depended upon continued control of C&O; that when Alleghany disposed of control of C&O, the order was no longer binding on Alleghany. Alleghany stated this position in a letter dated January 28, 1954 from Burton K. Wheeler, its counsel, to the ICC. That letter reads in part as follows:

> "The Commission's 1945 order prescribed the conditions under which, alone, it would permit Alleghany to control Cheaspeake and Ohio, but the Order did not purport to go further and prescribe absolute requirements which would be binding upon Alleghany, its

officers, and directors at all times henceforth, entirely apart from its control of Chesapeake and Ohio. The conditions surrounding the authorization of Alleghany to control Chesapeake and Ohio depended upon continued control of Chesapeake and Ohio. They were co-extensive in time with such control and did not endure after Alleghany ceased to exercise the authority granted it by the Order. It seems self-evident that, once Alleghany and Messrs. Young and Kirby ceased to exercise the authority thus granted, they were no longer required to conform to conditions which, in their origin and nature, were simply the conditions under which they might exercise the authority."

Despite its contentions to the ICC that the order of June 5, 1945 did not subject Alleghany to ICC jurisdiction after Alleghany disposed of its C&O control, Alleghany did nothing either by way of taking steps to have the ICC order revoked, or by way of registering with the SEC as an investment company. Its object was to stall any proceedings before the ICC until after May 26, 1954, the date when the New York Central proxy fight would be resolved, so that Alleghany could evade any interference from SEC control, by the claim that it was exempt from SEC jurisdiction because the June 5, 1945 order had not been physically and formally revoked by a proceeding before the ICC. Alleghany succeeded in delaying any formal ICC action as to the June 5, 1945 order until after the proxy fight was over.

On June 22, 1954, however, the ICC made an order directing Alleghany to show cause why the order of June 5, 1945 should not be vacated and set aside. This order to show cause was predicated upon the premise that the 1945 order was based upon Alleghany's control of C&O, that Alleghany had divested itself of C&O control, and that Alleghany did not propose to exercise further the authority granted by the order.

In response to the June 22, 1954 order to show cause, Alleghany requested a delay of the hearing, but by order dated July 1, 1954, the ICC denied Alleghany's request on the ground that it had given no good reasons warranting the granting of an adjournment.

On or about July 23, 1954, Alleghany added something new to the situation. It requested leave of the ICC to make a new application to be considered as a carrier subject to the Interstate Commerce Act. This new application had nothing to do with the facts upon which the June 5, 1945 order was predicated. The new application was predicated upon the fact that Alleghany and New York Central were seeking to be considered as a carrier subject to the provisions of the Interstate Commerce Act, because of their control of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and subsidiaries. Accordingly, at the request of Alleghany, the ICC, by order dated July 23, 1954, made an order withholding action on the order to show cause to cancel the June 5, 1945 order, so as to give Alleghany an opportunity to make its application for a new order based upon the new facts.

The new application of Alleghany for an order to be considered as a carrier because of the control of the Cleveland, Cincinnati, Chicago and St. Louis Railway and subsidiaries, was approved by the ICC on March 2, 1955. The form of the March 2, 1955 order was similar to that of the June 5, 1945 order. It approved, subject to certain conditions relating to the deposit of certain railroad securities with a voting trust, the merger of the properties and leases of subsidiary corporations, and determined that as a result of these transactions and the ICC approval thereof, Alleghany was to be considered as a carrier subject to the provisions of the Interstate Commerce Act, "unless and until otherwise ordered," and "to the same extent that these provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates".

In the same March 2, 1955 order, the ICC summarily dismissed what remained of the 1945 order, by ordering that "the effective portions of the order of June 5, 1945 ...be and they are hereby terminated and shall be of no further force and effect".

On May 24, 1955, the full ICC affirmed the order of March 2, 1955.

The action at bar was commenced almost two years after March 2, 1955, when the ICC made its order declaring that its June 5, 1945 order was a nullity. The action is for rescission of the sale of the 800,000 shares of Central stock by C&O to Alleghany, on the ground that the transaction was null and void because Alleghany, as an investment company, had failed to register as required by the Investment Company Act.

The Court of Appeals, in adopting the opinion of the District Court, held that even though this is an action for rescission, it is an indirect attack on the ICC order of June 5, 1945 which had been declared defunct by the ICC some two years prior to the commencement of this action; that such attack requires the plaintiff to proceed under the Urgent Deficiencies Act; that the Urgent Deficiencies Act requires the action to be brought against the United States; that since the United States is an indispensable party, which has not been made a defendant, the action must be dismissed for want of subject matter jurisdiction.

Reasons for Granting the Writ

I

The decision of the Court of Appeals is squarely in conflict with this court's decisions in *United States* v. *Griffin*, 303 U. S. 226 (1938), and *United States* v. *Jones*, 336 U. S. 641 (1949).

Griffin and *Jones* held that the Urgent Deficiencies Act was passed to provide for particularly special and extraordinary situations. It does not apply to all situations even where it is sought directly to attack an order of the ICC. Its application is limited to cases of public importance having such widespread effect as to justify granting the extraordinary features possessed by the Act. Among these extraordinary features is protection against possible ill considered action by a single judge, and granting the case precedence over others.

Griffin, involved a suit brought under the Urgent Deficiencies Act, to set aside an order of the ICC which denied an application made by the Georgia & Florida Railroad to increase the allowance for railway mail compensation theretofore made to the railroad. The ICC had denied the application because it found that the existing rates were fair and reasonable. The Railroad contended, among other things, that the ICC order was unlawful because the finding that the existing rates were fair and reasonable was without evidence to support it and contrary to the evidence, and that the order violated the Fifth Amendment by taking property without just compensation. The United States Supreme Court, after discussing the history and purposes of the Urgent Deficiencies Act, held that it was not applicable even though the case sought to set aside an order of the ICC. The court determined that the Act applies only to cases attacking an ICC order where there is such a wide public interest in its speedy determination as to justify the imposition of the extraordinary features which the Act was designed to grant. Among these features is protection against ill considered action by a single judge, and the averting of the delays ordinarily incident to litigation. The Court said at 303 U. S. 226, 232-233, 234-235:

> "The Urgent Deficiencies Act provides a method of judicial review of orders of the Interstate Com-

merce Commission possessing the following extraordinary features: (1) The original hearing in the district court is not before a single judge, but before three, of whom one must be a circuit judge; (2) From the decree of the district court as so constituted a direct appeal to the Supreme Court is granted as of right, instead of a review by a circuit court of appeals; (3) Upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others. These features were first introduced by the Expediting Act of 1903, 32 Stat. 823, for suits by the United States to enforce the antitrust and commerce laws. They were extended by the Hepburn Act of 1906 § 5, 34 Stat. 584, 590, 592, to suits to enforce or to set aside orders of the Interstate Commerce Commission. When that jurisdiction was vested in the Commerce Court provisions with like effect were provided for cases coming before it. 36 Stat. 539. To its jurisdiction the district court succeeded, with these features, under the Urgent Deficiencies Act.

In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify,

in cases affecting them, the extraordinary features of the Urgent Deficiencies Act."

* * *

In *Jones,* this court reaffirmed the *Griffin* rule and stated in footnote 6 of 336 U. S. 641, 647:

> ". . . . Congress could not be assumed to have made the extraordinary remedy of the Urgent Deficiencies Act applicable to such orders as the one here involved, since 'There is no wide public interest in its speedy determination'; 'no danger of temporarily interrupting the mail service through the improvident issue of an injunction by a single judge'; and 'only the method or amount of payments currently to be made would be affected.' "

In the case at bar, the plaintiff is seeking to rescind and annul a sale of shares of stock. The issue is whether the shares should remain the property of Alleghany, or whether the shares should be returned to C&O. In no aspect of the case is the issue of such public importance as to bring it within the purview of the Urgent Deficiencies Act. There is neither threat nor possibility of interruption of any services required by the public. There is nothing in the case of such public importance and widespread effect to warrant a three judge court as possible protection against ill considered action by a single judge, or to warrant giving the case precedence over other pending cases, or to warrant placing it in the posture that direct review to the Supreme Court of the United States should be granted, instead of review by the Court of Appeals. There is nothing in the case which warrants or justifies the imposition of the extraordinary remedies granted by the Urgent Deficiencies Act.

A reading of the District Court's opinion reveals that the District Court recognized that there is nothing in the case of such public importance and widespread effect as

to warrant or justify the imposition of the extraordinary remedies granted by the Urgent Deficiencies Act. In footnote 6 of the District Court opinion (244 F. Supp. 51), the court indicates doubt as to whether the defendants would be entitled to a three judge court in this action, thereby accepting that this case is the kind which could conceivably be heard by a single District Court judge. Since one of the main reasons for imposing the extraordinary remedies of the Urgent Deficiencies Act, is that the case is of such public importance and widespread effect as to require a three judge court as possible protection against ill considered action by a single judge, the District Court conceded that a basic reason for the imposition of the Urgent Deficiencies Act does not exist.

At no time since the case at bar was commenced, have the defendants made any claim that preferential speed is necessary. On the contrary, the defendants have at all times handled the case as traditional one judge District Court litigation. The action was commenced on January 18, 1957. The answers of the appellees were not filed until more than two years thereafter on March 30, 1959 and April 23, 1959. None of the answers mentions the Urgent Deficiencies Act, or claims that matters of widespread public policy are involved, or claims that speedy preferential treatment is required. The first time that the Urgent Deficiencies Act was asserted by the defendants was in October 1963, more than six years after the action was commenced, when they made their motions for summary judgment.

The June 5, 1945 order is now defunct. The ICC declared it defunct two years prior to the commencement of the action at bar, by its order dated March 2, 1955. Hence if it could be said that the court in the case at bar is being called upon to make a decision which will affect that order, the decision can only affect a defunct ICC order. A decision which affects a defunct order cannot have any public

importance in providing a speedy determination and cannot have widespread effect of any kind on the transportation system.

By determining that the Urgent Deficiencies Act was involved in this case, the Court of Appeals is squarely in conflict with *Griffin* and *Jones*.

II

Whether this case comes within the purview of the Urgent Deficiencies Act, is an issue which is fundamental to the further conduct of the case. The matter is jurisdictional. Jurisdiction can be raised at any time. Hence plaintiff finds himself in the position where if he proceeded with the litigation under the Urgent Deficiencies Act, it might later be held upon appeal to this court, that the Urgent Deficiencies Act was not applicable and the proper remedy was to bring the action as a traditional one judge District Court litigation. Since, as shown above, the determination of the Court of Appeals is squarely in conflict with the decisions of this Court determining jurisdiction under the Urgent Deficiencies Act, the possibility that plaintiff will find himself on a jurisdictional merry-go-round unless this Court grants certiorari and determines the question of jurisdiction, is not remote.

It is no secret that the plaintiff is litigating against individuals and corporations with substantial monies behind them. One of their means of endeavoring to discourage this litigation and avoid a trial on the merits, is to skirmish with the plaintiff on peripheral matters such as jurisdiction, in the hope that they can exhaust him by causing him to expend his funds in the search for the proper jurisdictional forum in which to assert his rights on the merits. The defendants have partly succeeded in their endeavor by their maneuver in moving to dismiss the complaint after nine years, on the ground that the action should have been brought under the Urgent Deficiencies Act. In order to prevent the defendants from engaging in

a similar tactic if an action were brought by the plaintiff under the Urgent Deficiencies Act, this court should grant certiorari and determine the matter of jurisdiction once and for all, so that after this court determines which is the proper jurisdiction, the plaintiff may proceed to a trial on the merits without fear that he may again be caught in a jurisdictional boomerang.

III

The decision of the Court of Appeals is squarely in conflict with this court's decisions in *Shannahan* v. *United States,* 303 U. S. 596 (1938), *Rochester Tel. Corp.* v. *United States,* 307 U. S. 126 (1939), *Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151 (1957), as well as the three judge court decision in *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (S.D.N.Y., 1955).

Although the language of the Urgent Deficiencies Act (28 U.S.C. Sec. 2321) refers to "any order," this court has held that the Act does not apply to all orders of the ICC. In order to come within the purview of the Urgent Deficiencies Act, an order of the ICC must have certain characteristics.

In *Shannahan,* the Railway Labor Act conferred upon the National Mediation Board certain duties in respect to carriers which were subject to the Interstate Commerce Act. The Railway Labor Act also provided that certain kinds of carriers were exempted from the aforementioned provision of the Railway Labor Act, and conferred upon the ICC, the authority to determine, after hearing, whether a given carrier came within the exception. A hearing was held before the ICC and it determined that the Chicago, South Shore and South Bend Railroad did not come within the exemption. The Railroad sought a rehearing of the ICC's determination. The ICC denied the rehearing and entered an order denying same. The Railroad commenced

a proceeding under the Urgent Deficiencies Act to set aside the alleged order. The ICC intervened in the case and challenged the jurisdiction of the court on the ground that the order of the ICC was not an order within the meaning of the Urgent Deficiencies Act. The United States Supreme Court agreed and held that the order did not have the characteristics of an order which was subject to judicial review under the Urgent Deficiencies Act. In referring to the ICC proceeding which led to the order, the Court said at 303 U. S. 596, 599, 601:

> "The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative'. United States v. Illinois Cent. R. Co., 244 U. S. 82, 89; United States v. Atlanta, B. & C. R. Co., 282 U. S. 522, 527, 528. Compare Lehigh Valley R. Co. v. United States, 243 U. S. 412, 414. But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. 'It was merely preparation for possible action in some proceeding which may be instituted in the future.' United States v. Los Angeles & S. L. R. Co., 273 U. S. 299, 310.
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> "The determination (of the ICC) whether applied for by the Board, by a carrier, or by employees, is clearly not an order enforceable within the meaning of the cases construing and applying the Urgent Deficiencies Act. It is a decision on a controverted matter, comparable to those considered in United States v. Los Angeles & Salt Lake R. Co., 273 U. S. 299, in Great Northern Ry. Co. v. United States, 277 U. S. 172, in United States v. Atlanta, B. & C. R. Co., 282 U. S. 522, and in United States v. Griffin, ante p. 226, which were held not to be subject to review under the Urgent Deficiencies Act."

In *Rochester,* the case in which the United States Supreme Court did away with the "negative doctrine" basis for determining reviewability, the court explained its previous decisions. It reaffirmed its decisions holding that orders of the ICC which merely determine status are not subject to review, and pointed out that the real reason for holding such orders not to be subject to review, is that traditional conceptions of federal judicial power make resort to the federal courts in cases involving status orders, either premature or wholly beyond the province of the federal courts. The court said at 307 U. S. 126, 130:

> "In group (1) the order sought to be reviewed does not of itself adversely affect the complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province.
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> * * *
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> "The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a 'final valuation' under the Valuations Act: 'The so called order here complained of is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege or license; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation.' United States v. Los Angeles & S.L.R. Co., 273 U. S. 299, 309-310."

Breswick, which was decided by a three judge court, involved the very order with which we are concerned in the case at bar. In that case, the order of June 5, 1945

establishing Alleghany's status as a carrier, was followed by a subsequent ICC order of June 22, 1955, which authorized the issuance of preferred stock. The plaintiffs brought an action before a three judge court under the Urgent Deficiencies Act, claiming that when Alleghany sought to issue the preferred stock, a fact situation did not exist for bringing Alleghany within the purview of the Interstate Commerce Act, and therefore both the orders of June 5, 1945 and June 22, 1955 were improper. The three judge court held that the order of June 5, 1945 was reviewable only because the June 22, 1955 order was involved. It specifically held that the June 5, 1945 order, being a mere status order, was not reviewable under the test enunciated in *Rochester*. The court said at 138 F. Supp. 123, 131:

> "The order granting Alleghany carrier status and approving the issuance of the new preferred stock is reviewable under the test enunciated in Rochester Tel. Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147. Rochester held that, when an administrative order causes a plaintiff some individual harm, he may seek review of the administrative action in the courts, but that, until the administrative action causes such harm, no review is possible, since the suit would ask 'review of interim steps in a proceeding' and would therefore be premature. Although the plaintiffs perhaps suffered no injury from the I. C. C. order granting Alleghany carrier status, they were surely threatened with serious harm by the second order approving the issuance of the new preferred stock. Thus, while the status order, by itself, may not have been reviewable, nevertheless, once the I. C. C. made its order approving the issuance of the new preferred, there arose a right to seek revision of the preferred stock order and also of the status order on which the preferred stock order was based."

On appeal to this court, this court held that the June 5, 1945 order was reviewable only because the June 22, 1955 order, which threatened financial injury to the plaintiffs, had been made. Since the June 22, 1955 order was subject to attack, the plaintiffs could also attack the June 5, 1945 order, but only because the June 22, 1955 order threatened financial injury. This court said at 353 U. S. 151, 160:

> "Having acquired standing to institute proceedings in the District Court by virtue of the threatened financial injury, appellees could also attack the order of the Commission conferring on Alleghany the status of a person not a carrier but to be 'considered as a carrier.' If the Commission acted out of bounds in decreeing its status order, it had no power to approve the new preferred stock issue and the plaintiffs would be entitled to relief."[5]

The footnote 5 referred to at the end of the above quotation, reads as follows:

> "See Rochester Telephone Co. v. United States, 307 U. S. 125, 144, where the fact that the 'contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers...in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission.' Whether reviewability of a status order, without more, be deemed a matter of standing to review or a matter of finality of administrative action, the basis for decision is the same: has the action of the administrative agency threatened the interests of the complainant, whether corporation or, as here, stockholder otherwise qualified to sue, sufficiently to allow attack? ..."

This court also held that until the June 22, 1955 order of the ICC permitting the issuance of the preferred stock was made, there was no "interest" in anyone to attack any order of the ICC even when the June 5, 1945 order was in full being. This was because the June 5, 1945 order, was a mere assertion by the ICC of jurisdiction to regulate Alleghany, and such an order does not create an "interest" in anyone sufficient to enable the person to bring an action attacking the ICC's jurisdiction. The court said at 353 U. S. 174-175:

> "No special threat to appellees arises from the mere assertion of Commission jurisdiction to regulate Alleghany. When subsequent Commission action in approving the Alleghany's new preferred stock issue did present a special threat to appellees, that provided the 'interest' sufficient to attack the Commission's jurisdiction in the present proceeding. But this threat could not retroactively confer upon them the right to a hearing in the merger-status order proceeding, in which they had no 'interest'."

According to the above determinations of this court, an order is not reviewable unless two prerequisites are met: a) the order must be contested in the sense that there is a justiciable controversy concerning its making, (b) the order must threaten injury to the interests of the persons allegedly attacking it.

As was specifically determined by this court in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 160, and by the three judge court in *Breswick & Co.* v. *United States,* 138 F. Supp. 123, the order of June 5, 1945, by itself, had none of the characteristics of an order which would be subject to judicial review under the Urgent Deficiencies Act. Although in the form of an order, it was nothing more than a fact finding determination by the ICC that as a result of the fact situation existing on that date, Alleghany was to

be considered as a carrier subject to the provisions of Sec. 20(1) to (10) and Sec. 20a(2) to (11) of the Interstate Commerce Act. It was nothing more than a decision on a fact finding matter which purpoted to act as a guide line for Alleghany's conduct in the future so long as the fact situation continued. It was neither a command to Alleghany to continue the fact situation, nor a prohibition to Alleghany from changing the fact situation. There was no justiciable controversy about the order when it was made. In fact, no one disputes that when it was made, it was correctly made. Nor did it threaten injury to any of plaintiff's rights in the case at bar.

The action about which plaintiff complains in the case at bar, is the sale by C&O of the 800,000 shares of Central stock to Alleghany, when it was not registered as an Investment Company and thereby violated the Investment Company Act. The ICC had nothing to do with this.

Hence the June 5, 1945 order, as involved in the case at bar, has none of the characteristics of an order which is reviewable in accordance with the principles established by this court in the above cases. The District Court and Court of Appeals, held that the Urgent Deficiencies Act was applicable to the case at bar, on the theory that all orders of the ICC are reviewable under the Urgent Deficiencies Act (244 F. Supp. 51, 67-68). This is squarely in conflict with the above decisions of this court.

IV

The decision of the Court of Appeals is squarely in conflict with its own decision in *Long Island Railroad Co.* v. *New York Central Co.*, 281 F. 2d 379 (CA 2d, 1960).

In the *Long Island Railroad* case, the plaintiff brought an action before a single judge district court to enjoin the defendant from continuing what the plaintiff characterized as an unlawful operation. The defendant carrier had

sought to initiate a truck and tractor-trailer service to a new freight depot. The plaintiff urged to the ICC, pursuant to Sec. 1(18) of the Interstate Commerce Act, that a certificate of convenience and necessity would be necessary. The ICC discontinued all proceedings and ruled that such a certificate was not necessary. Plaintiff then sought an injunction before a single judge in the District Court, under Sec. 1(20) of the Interstate Commerce Act, to halt a claimed illegal operation. Defendant moved to dismiss the action on the ground that it came within the purview of the Urgent Deficiencies Act and plaintiff had not complied with the Act. The District Court denied the motion. On appeal to the Court of Appeals, it was held that the Urgent Deficiencies Act did not apply because plaintiff was not seeking to enjoin an order of the ICC, but rather was seeking to enjoin an activity being taken without an order of the ICC, which plaintiff contended was necessary before defendant could legally undertake the activity.

The court said at 281 F. 2d 379, 381:

> "Here plaintiffs seek to enjoin not an order by the Commission but action proposed to be taken by the Central without the order from the Commission which plaintiffs say is necessary for legality. A suit before a single district judge has long been the remedy in such a case."

This is the situation in the cases at bar. Prior to purchasing the 800,000 shares of Central stock, Alleghany concededly did not make any application to the ICC for approval of the transaction. The case at bar is therefore within the purview of the *Long Island Railroad* case. Plaintiffs are attacking a transaction claimed by them to be illegal, and prior to entering into the transaction, Alleghany did not seek any order from the ICC with respect thereto. In this circumstance, as stated by this court in *Long Island*, "a suit before a single judge has long been the remedy,' and the Urgent Deficiencies Act does not apply.

V

The question presented is of great importance to the administration of the Interstate Commerce Act. If the determination of the Court of Appeals in the case at bar is permitted to stand, any order made by the Interstate Commerce Commission, even though of no public importance or widespread effect, will bring a case within the Urgent Deficiencies Act and the extraordinary remedies provided by the Act. If the determination of the Court of Appeals in the case at bar is permitted to stand, any order made by the Interstate Commerce Commission even though remotely involved in the litigation, and even though defunct at the time the action is brought, will bring the case within the Urgent Deficiencies Act and the extraordinary remedies provided by the Act.

This will open this Court to a flood of appeals as of right from three judge court determinations, even though they involve matters of no public importance or widespread effect on transportation, and even though the effect of the ICC order on the litigation is remote and inconsequential.

CONCLUSION

Certiorari should be granted to protect the integrity of this Court's decisions in *Shannahan* v. *U. S.*, *Rochester Tel. Corp.* v. *U. S.*, *U. S.* v. *Griffin*, *U. S.* v. *Jones and Alleghany Corp.* v. *Breswick & Co.*

Heflin v. *U. S.*, 358 U. S. 415 (1959);
Woods v. *Interstate Realty Co.*, 337 U. S. 535 (1949);
Globe Liquor Co. v. *San Roman*, 332 U. S. 571 (1948);
Aetna Casualty Co. v. *Flowers*, 330 U. S. 464 (1947);
Fiswick v. *United States*, 329 U. S. 211 (1946);
NLRB v. *Cheney Lumber Co.*, 327 U. S. 385 (1946).

Certiorari should be granted to resolve the conflict between the determination of the Court of Appeals for the Second Circuit in *Long Island Railroad Co.* v. *New York Central Co.*, and its determination in the case at bar.

Certiorari should be granted to determine the issue of jurisdiction which is fundamental to the further conduct of the case.

Land v. *Dollar*, 330 U. S. 731 (1947);
United States v. *General Motors*, 323 U. S. 373 (1945).

Certiorari should be granted because the question presented is of great importance to the administration of the Interstate Commerce Act and to the administration of this Court.

British Transportation Commission v. *U. S.*, 354 U. S. 129 (1957);
Brownell v. *We Shung*, 352 U. S. 180 (1956);
Stern and Gressman—Supreme Court Practice (3rd ed. 1962), Sec. 4-1.

Respectfully submitted,

SIDNEY L. GARWIN and J. MILTON FAINER,
Attorneys for Sandor Schwartz, Petitioner,
1501 Broadway,
New York, N. Y. 10036.

Judgment of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of May, one thousand nine hundred and sixty-six.

Present—

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
Circuit Judges.

SANDOR SCHWARTZ,
Plaintiff-Appellant,

vs.

ROBERT J. BOWMAN, et al.,
Defendants,

CYRUS S. EATON, WALTER J. TUOHY, ANITA O'KEEFFE YOUNG, as Executrix of the Estate of ROBERT R. YOUNG, deceased, CLINTON W. MURCHISON, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the United States Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellees, Cyrus S. Eaton, Walter J. Tuohy and Cyrus S. Eaton Jr., and Anita O'Keeffe Young, etc.

A. DANIEL FUSARO,
Clerk.

Opinion of the Court of Appeals for the Second Circuit.

PER CURIAM MEMORANDUM OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 19, 1966.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOS. 274 AND 305—SEPTEMBER TERM, 1965.

(Argued March 30, 1966 Decided May 19, 1966.)

DOCKET NOS. 30147, 30213

No. 30147

JEANETTE ANNENBERG,

Plaintiff-Appellant,

-v.-

ALLEGHENY CORPORATION AND THE CHESAPEAKE AND OHIO RAILWAY CO.,

Defendants-Appellees.

No. 30213

SANDOR SCHWARTZ,

Plaintiff-Appellant,

-v.-

CYRUS S. EATON, WALTER J. TUOHY, CYRUS S. EATON, JR., CLINTON W. MURCHISON, ANITA O'KEEFFE YOUNG, as Executrix of the estate of ROBERT R. YOUNG, Deceased,

Defendants-Appellees,

and

ROBERT BOWMAN, ALLAN B. KIRBY, ALLEGHANY CORPORATION AND THE CHESAPEAKE & OHIO RAILWAY CO., et al.,

Defendants.

BEFORE:

WATERMAN, MOORE AND FEINBERG,

Circuit Judges.

Opinion of the Court of Appeals for the Second Circuit.

Appeals from orders of the United States District Court for the Southern District of New York, Bryan, J., granting motions for dismissal of the complaints and for summary judgment pursuant to Rules 12(b) and 56(b), F. R. Civ. P. Judgments below affirmed on the opinion below in Schwartz v. Bowman, 244 F. Supp. 51 (S.D.N.Y. 1965).

NORMAN ANNENBERG, New York City, for Appellant Annenberg.

ROGERS, HOGE & HILLS, SIDNEY P. HOWELL, JR., MARIE V. DRISCOLL, for Alleghany Corporation.

DONOVAN, LEISURE, NEWTON & IRVINE (Carl E. Newton, James M. MacNee, M. Lauck Walton, of counsel), New York City, for Chesapeake & Ohio Ry.

J. MILTON FAINER, SIDNEY L. GARWIN, BERTRAM BRONZAFT, New York City, for Appellant Schwartz.

DONOVAN, LEISURE, NEWTON & IRVINE (Carl E. Newton, M. Lauck Walton, of counsel), for Appellees Eaton, Tuohy and Eaton, Jr.

SATTERLEE, WARFIELD & STEPHENS (Henry J. Forman, Jr., of counsel), New York City, for Appellee Murchison.

LORD, DAY & LORD (Thomas F. Daly, William E. McCurdy, Jr., of counsel), New York City, for Appellee Young.

PER CURIAM:

In No. 30213, plaintiff Schwartz appeals from an order of the United States District Court for the Southern District

of New York in *Schwartz* v. *Bowman,* his stockholder's derivative action against several defendants on behalf of Chesapeake & Ohio Railway Co., in which case motions by each of the defendants-appellees for dismissal of the complaint and for summary judgment pursuant to Rules 12(b) and 56(b) F. R. Civ. P. were granted.

In No. 30147, plaintiff Annenberg, who had brought her stockholder's derivative action on behalf of Alleghany Corporation, appeals from the granting on the same day by the same court of a similar motion made in her case by defendant Chesapeake & Ohio Railway Company.

The motions were disposed of together, counsel for the plaintiffs in the two actions submitting joint papers in opposition to the motions. The motions were granted as to defendants-appellees in both cases on the ground that as to them the court had no subject-matter jurisdiction over the two complaints.

Judge Bryan rendered an opinion in *Schwartz* v. *Bowman,* reported at 244 F. Supp. 51 (S.D.N.Y. 1965), and filed a memorandum opinion the same day in Annenberg, in which he stated he was dismissing the latter complaint entirely for the reasons expressed in his opinion in *Schwartz* v. *Bowman.*

We affirm the judgments below dismissing the complaint in Annenberg and the complaint as to the defendants-appellees in Schwartz on the exhaustive and learned opinion below of Judge Bryan in *Schwartz* v. *Bowman* and on his unreported memorandum opinion in *Annenberg* v. *Alleghany.*

Order of the Interstate Commerce Commission, dated June 5, 1945.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 5th day of June, A. D. 1945

F. D. No. 14692

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

No. 29085

IN RE ALLEGHANY CORPORATION CONTROL

Investigation of the matters and things involved in these proceedings having been made, hearings having been held, and said Division having on the date hereof made and filed a report containing its findings of fact and conclusions part hereof:

* * * * * *

It is further ordered, That acquisition by the Alleghany Corporation of control, through ownership of stock, of The Chesapeake and Ohio Railway Company, The New York, Chicago and St. Louis Railroad Company and the Pere Marquette Railway Company, and their subsidiaries and affiliates, be, and it is hereby, approved and authorized: Provided, however, that this authorization and approval are granted subject to the express conditions numbered (1), (2), and (3), relative to the depositing of stocks with independent voting trustees and to the elimination of interlocking directors, set forth in said report.

It is further ordered, That the trust agreements in the form submitted with the Alleghany Corporation's petition filed April 13, 1945, and the trustees nominated therein be, and they are hereby, approved.

Order of the Interstate Commerce Commission, dated June 5, 1942.

It is further ordered, That within 10 days after execution of said trust agreements, said Alleghany Corporation and said The Chesapeake and Ohio Railway Company shall file with this Commission verified copies of said agreements in the form in which they were executed.

It is further ordered, That the Alleghany Corporation shall report to this Commission quarterly beginning with July 1, 1945, any changes in matters covered by said trust agreements.

It is further ordered, That unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act to the same extent that those provisions are applicable to The Chesapeake and Ohio Railway Company and its carrier subsidiaries and affiliates; Provided, that as to the applicability of said provisions of Section 20 and Section 20a to said Alleghany Corporation this order shall take effect and be in force on and after the date hereof, except that as to the provisions of Section 20 pertaining to annual reports, it shall be deemed effective as of January 1, 1945.

And it is further ordered, That the proceeding in No. 29085, In Re Alleghany Corporation Control, be, and it is hereby, discontinued.

* * * *

URGENT DEFICIENCIES ACT (28 USC Sec. 2321)

"The procedure in the district courts in actions to . . . suspend, enjoin, annul or set aside . . . any order of the Interstate Commerce Commission . . . shall be as provided in this chapter."